

Yap Wai Yean v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
B-05-66 OF 2009

SURIYADI, HASAN LAH AND AHMAD MAAROP JJCA

30 MARCH 2010

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Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Whether appellant innocent and momentary carrier — Whether trial judge erred in his finding — Whether misdirection by trial judge resulting in miscarriage of justice — Dangerous Drugs Act 1952 s 39B(1)(a)

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On 20 July 2007, when the police conducted a drug surveillance raid in the Royale Bintang Hotel, Damansara ('the hotel'), the appellant and another ('PW3') were arrested. At the time of the arrest, the appellant was carrying a plastic bag in his right hand in which there was a Panasonic box containing a whitish substance, which the chemist later confirmed to be 155g of heroin. The police also conducted a body search of PW3 but did not find any incriminating evidence on him. However, the bunch of keys recovered from PW3 led to the inspection of a car parked in the basement car park of the hotel and the discovery of a crystal like substance, which was later confirmed to be methamphetamine, near the gear stick between the driver's seat and the front passenger's seat. The appellant was charged with the offence of trafficking in 155g of heroin under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the close of the prosecution case the trial judge found that a prima facie case had been made out against the appellant and called for the defence to present its case. The appellant's defence was that he had no knowledge of the contents of the plastic bag, that he was only an innocent and momentary carrier of the plastic bag that belonged to PW3 and that PW3 was the real trafficker. PW3 testified that he had never met the appellant prior to meeting him on 20 July 2007 and that he had been asked by one Ah Ma, a mutual friend in whose company he had met the appellant, to send the latter to the hotel. According to PW3, the plastic bag that the appellant was carrying belonged to him and he had no knowledge of its contents. The trial judge held that the defence had failed to create any reasonable doubt or rebut the presumption of trafficking under s 37(da) of the Act. In fact the trial judge found that the whole scheme of the defence was one of bare denial and afterthought and hence, could not be accepted as an explanation as to how the appellant came to be holding the plastic bag allegedly belonging to PW3 at the time of his arrest. The trial judge thus found the appellant guilty of the charge of trafficking and he was sentenced to death. This was the appellant's appeal against the conviction and sentence. In his appeal, the appellant submitted that the trial judge had erred in his

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- A finding that the defence had not cast any reasonable doubt on the prosecution's case. Further he submitted that PW3 was not a credible and reliable witness and as such the court should not place any weight on his evidence. In support of this submission the appellant relied on the evidence of the drugs found in PW3's car shortly after the appellant was arrested and on the fact that he was remanded with the appellant for 14 days in relation to the heroin found in the plastic bag. The prosecution maintained that there was no evidence to impute PW3 with liability as the real trafficker and that the failure of the appellant to immediately inform the arresting officer that the drugs belonged to PW3 denoted late disclosure.
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Held, allowing the appeal:

- (1) Although the trial judge was correct in his finding that a prima facie finding had been made out by the prosecution against the appellant at the close of the case for the prosecution, he had gravely erred when he held that the appellant's defence was an afterthought as the appellant did not inform the police that the plastic bag belonged to PW3 when he was arrested. This serious misdirection had gravely prejudiced the appellant and had occasioned a substantial miscarriage of justice warranting appellate interference. The appellant's explanation as to how he came by the plastic bag at the time of the arrest was not improbable given that the police personnel did not see what happened from the time the appellant and PW3 alighted from PW3's car to the time they entered the lobby of the hotel. Further there was no evidence by an independent prosecution witness to support PW3's testimony that the appellant was carrying the plastic bag from the time he alighted from P3's car (see paras 24, 34–36).
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- (2) The appellant's defence that PW3 was the trafficker and that the plastic bag containing the heroin belonged to him could be supported by the fact that he was carrying RM2,000 despite not working for two years and by the fact that drugs were found in his car. There was also the strange fact that PW3 came all the way from Sri Petaling to Kepong just to send the appellant to the hotel when he did not even know the appellant. However, the trial judge failed to comment on this (see paras 39 & 41).
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- (3) The trial judge adopted an over-simplistic approach to the case for the prosecution and the defence, in that he failed to take into account or to give proper weight to or draw proper inferences from every fact in favour of the appellant and thus failed to review the evidence from all angles, with the result that a miscarriage of justice had occurred. The trial judge's failure to consider the appellant's explanation, which was sufficient to create a reasonable doubt as to his guilt, meant that there
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had been little or no judicial appreciation of the evidence and necessitated the appellate interference (see paras 42–43).

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[Bahasa Malaysia summary]

Pada 20 Julai 2007, semasa pihak polis menjalankan penyerbuan pengawasan dadah di Hotel Royale Bintang Damansara ('hotel'), perayu dan seorang lagi ('P3') telah ditangkap. Pada masa penangkapan, perayu sedang memegang beg plastic di tangan kanannya yang mana terdapat kotak Panasonic yang mengandungi bahan keputih-putihan yang disahkan oleh pakar kimia sebagai 155g heroin. Pihak polis juga menjalankan pemeriksaan badan ke atas P3 tetapi tidak menjumpai sebarang bukti yang membabitkannya. Walau bagaimanapun, seberkas kunci didapati daripada P3 yang membawa kepada pemeriksaan sebuah kereta yang diletakkan di tempat letak kereta bawah tanah hotel dan penemuan bahan seperti kristal, yang kemudiannya disahkan sebagai methamphetamine, berdekatan dengan batang gear antara tempat duduk pemandu dan tempat duduk penumpang hadapan. Perayu dituduh dengan kesalahan mengedar 155g heroin di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Semasa penggulungan kes pihak pendakwaan, hakim memutuskan kes prima facie telah dibuktikan ke atas perayu dan memanggil pihak pembelaan untuk membentangkan kes. Pembelaan perayu adalah bahawa beliau tidak mempunyai pengetahuan akan kandungan beg plastik, bahawa dia tidak bersalah dan hanyalah pembawa sementara beg plastik yang dimiliki P3 dan bahawa P3 adalah pengedar sebenar. P3 memberi keterangan bahawa dia tidak pernah bertemu dengan perayu sebelum 20 Julai 2007 dan dia telah diarahkan oleh Ah Ma, rakan mereka yang mana telah bersama-sama bertemu perayu, untuk menghantarnya ke hotel. Menurut P3, beg plastik yang dibawa oleh perayu adalah milik perayu dan dia tiada pengetahuan tentang kandungannya. Hakim perbicaraan memutuskan pihak pembelaan gagal untuk mewujudkan sebarang keraguan munasabah atau menyangkal anggapan pengedaran di bawah s 37(da) Akta. Malahan, hakim perbicaraan mendapati bahawa keseluruhan rancangan pihak pembelaan adalah penafian semata-mata dan sesuatu yang difikirkan kemudian dan oleh itu, tidak boleh diterima sebagai satu penerangan tentang bagaimana perayu boleh memegang beg plastik yang kononnya milik P3 pada masa penangkapan. Hakim perbicaraan seterusnya mendapati perayu bersalah dalam pertuduhan pengedaran dan dia dihukum mati. Ini adalah rayuan perayu terhadap sabitan dan hukuman. Di dalam rayuan, perayu menghujahkan bahawa hakim perbicaraan telah membuat kesilapan dalam keputusannya bahawa pihak pembelaan tidak menimbulkan keraguan munasabah dalam kes pendakwaan. Seterusnya, dia menghujahkan P3 tidak boleh dipercayai dan mahkamah tidak sepatutnya menerima keterangannya. Bagi menyokong hujah ini, perayu bersandarkan pada bukti dadah-dadah yang dijumpai dalam kereta P3 sejurus selepas perayu ditangkap dan fakta bahawa dia telah direman bersama perayu selama 14 hari berhubung dengan heroin yang dijumpai dalam beg plastik tersebut. Pihak pendakwaan

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- A menekankan bahawa tiada bukti yang mengaitkan P3 dengan liabiliti sebagai pengedar sebenar dan kegagalan perayu untuk memaklumkan dengan segera kepada pegawai tangkapan bahawa dadah-dadah tersebut dimiliki oleh P3 adalah suatu pendedahan yang terlewat.
- B **Diputuskan**, membenarkan rayuan:
- C (1) Walaupun hakim bicara betul dalam keputusannya bahawa penemuan prima facie telah dilakukan oleh pihak pendakwaan terhadap perayu pada akhir kes pihak pendakwaan, beliau telah khilaf apabila memutuskan bahawa pembelaan perayu merupakan sesuatu yang difikirkan kemudian kerana perayu tidak memaklumkan pihak polis bahawa beg plastik tersebut adalah kepunyaan P3 semasa dia ditangkap. Salah arah yang serius ini telah memprejudiskan perayu dan mengakibatkan salah laksana keadilan yang sangat besar dan memerlukan campur tangan mahkamah rayuan. Penjelasan perayu berkenaan bagaimana beg plastik tersebut berada dalam tangannya semasa ditangkap adalah berkemungkinan berlaku kerana kakitangan polis tidak nampak apa yang berlaku dari masa perayu dan P3 keluar dari kereta P3 hingga mereka masuk ke lobi hotel. Selanjutnya tiada keterangan oleh saksi bebas pihak pendakwaan untuk menyokong keterangan P3 bahawa perayu membawa plastik beg tersebut semasa dia keluar dari kereta P3 (lihat perenggan 24, 34–36).
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- F (2) Pembelaan perayu bahawa P3lah pengedarnya dan bahawa beg plastik yang mengandungi heroin tersebut milik P3 boleh disokong dengan fakta bahawa dia membawa RM2,000 walaupun tidak bekerja selama dua tahun dan juga fakta bahawa dadah tersebut dijumpai dalam keretanya. Juga terdapat fakta aneh bahawa P3 datang dari Sri Petaling ke Kepong semata-mata untuk menghantar perayu ke hotel apabila dia sendiri tidak mengenali perayu. Tetapi, hakim bicara gagal untuk mengulas isu ini (lihat perenggan 39 & 41).
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- H (3) Hakim bicara menggunakan pendekatan yang terlalu ringkas ke atas kes ini bagi pihak pendakwaan dan pembelaan, yang mana beliau gagal mempertimbangkan atau menilai atau membuat inferens yang sepatutnya atas setiap fakta yang memihak kepada perayu dan oleh itu gagal menyemak keterangan dari setiap sudut, dan akibatnya salah laksana keadilan telah berlaku. Kegagalan hakim bicara untuk
- I mempertimbangkan penjelasan perayu, yang mana mencukupi untuk membangkitkan keraguan terhadap kebersalahannya, bermaksud terdapat kekurangan atau tiada penilaian kehakiman terhadap keterangan dan memerlukan campur tangan mahkamah rayuan (lihat perenggan 42–43).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

Cases referred to

- Abdullah Zawawi bin Yusoff v PP* [1993] 3 MLJ 1, SC (refd)
Alcontara all Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Arulpragasam all Sandaraju v PP [1997] 1 MLJ 1, FC (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)
Ganapathy all Rengasamy v PP [1998] 2 MLJ 577, FC (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137, SC (refd)
Lim Kheak Teong v PP [1985] 1 MLJ 38, FC (refd)
Mardani bin Hussin v Pendakwa Raya [2009] MLJU 537; [2009] 6 CLJ 301, CA (refd)
Mat v PP [1963] MLJ 263 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Mohd Hazrin bin Md Sari v PP [2008] 3 MLJ 798; [2008] 5 CLJ 361, CA (refd)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)
Teng Howe Sing v PP [2009] 3 MLJ 46; [2009] 3 CLJ 733, FC (refd)

Legislation referred to

- Criminal Procedure Code s 182A(1)
 Dangerous Drugs Act 1952 ss 37(da), (da)(i), 39B, 39B(1)(a)
Darshan Singh Khaira (Tharanjit Singh and Tania Scivetti with him) (Sandhu & Associates) for the appellant.
Shoba a/p Venu Gobal (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Hasan Lah JCA:

[1] The appellant was charged for an offence of trafficking in 155g of heroin under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The charge reads as follows:

Bahawa kamu, pada 20 Julai 2007, jam lebih kurang 7 petang, di lobi Hotel The Royal Bintang Damansara, the Curve, 6 Jalan PJU 7/3, Mutiara Damansara, 47800 Petaling Jaya, di dalam daerah Petaling, di dalam negeri Selangor Darul Ehsan, telah memperedarkan dadah berbahaya, iaitu 155.0 gram heroin; dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

- A** [2] At the conclusion of the trial the learned trial judge found the appellant guilty of the charge of trafficking and he was sentenced to death. Hence, this appeal by the appellant.
- B** [3] On 16 November 2009, we dismissed the appeal. We now give our grounds.
- [4] The brief salient facts as adduced by the prosecution and the defence are as follows.
- C** [5] On 20 July 2007 at approximately 6pm, ASP Norosid bin Hj Mamat ('PW5') led a police party to conduct a drug surveillance and raid in Royale Bintang Hotel, Damansara ('the hotel').
- D** [6] After one hour, at approximately 7pm, PW5 saw two Chinese men (later identified as PW3 and the appellant) enter the hotel lobby area from the main entrance at the back. PW5 saw that the appellant was carrying a plastic bag with his right hand.
- E** [7] PW5 and PW6 (D/Kpl Roslan bin Abdul Rahman) proceeded to arrest the appellant. According to PW5, during the arrest, there was a struggle between him and the appellant as the latter tried to escape. During the struggle, PW5 seized the plastic bag from the appellant's right hand. Inside the plastic bag PW5 found a Panasonic box and inside that box PW5 found five packages wrapped in Chinese newspapers each containing transparent plastic packets that contained whitish substance suspected to be heroin. PW5 also conducted a body search on the appellant but did not find any other incriminating items from him.
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- G** [8] C/Insp Husni arrested PW3 and handed him over to PW5. PW5 then conducted a body search on PW3 and did not find any incriminating items. PW5 seized a bunch of car keys from PW3.
- H** [9] PW5 then brought PW3 and the appellant to the car park. Upon inspection of a car in the basement car park bearing registration No WJP 3645, PW5 found a black pouch near the gear stick in between the driver's seat and the front passenger's seat. Inside the black pouch PW5 found four transparent plastic packets which each contained crystal like substance suspected to be drugs.
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- [10] PW3 testified that on 20 July 2007 he went to Kepong to meet his friend Ah Ma who had earlier telephoned him and asked for his favour in giving a lift to the appellant.

[11] When PW3 arrived at the designated area in Kepong, PW3 saw Ah Ma and the appellant. PW3 never met the appellant prior to that. Ah Ma asked him to send the appellant to the hotel. A

[12] Once they reached the hotel, the appellant invited him to the hotel to have coffee to show the appellant's gratitude for the lift as well as to meet another friend. PW3 saw the appellant carrying the plastic bag out of the car with him and they both proceeded towards the lobby of the hotel. When they were in the lobby they were arrested by the police. B

[13] PW4, the government chemist, confirmed that the whitish substance found in the Panasonic box was heroin with a nett weight of 155g. C

[14] In his defence the appellant testified that on 20 July 2007 at around 3.30pm, a friend of his by the name of Ah Ma picked him up to go for a meal. They went to eat at a coffee shop in Kepong. After their meal, Ah Ma told the appellant that he was not free to send the appellant home and that he would ask one of his friends to send the appellant back. The appellant told Ah Ma that he could just go home by taxi but Ah Ma insisted and said his friend would be arriving there at any moment. D E

[15] About 5 minutes later, Ah Ma's friend (later identified as PW3) arrived in his car and Ah Ma went to the car and spoke to PW3 alone. The appellant saw PW3 come out of his car and stood next to his car while talking to Ah Ma. After several minutes Ah Ma waved to the appellant and asked him to come towards the car. The appellant went to the car and was told by Ah Ma that PW3 would send him home. F

[16] The appellant then entered PW3's car. As he entered he noticed that there was a plastic bag containing a box on the driver's seat. He saw PW3 take the plastic bag and placed it at the back passenger's seat. PW3 then told him that he had to go to IKEA in One Utama first before sending the appellant back home. After arriving in IKEA, the appellant and PW3 came out from PW3's car. PW3 took the plastic bag which he had earlier placed at the back passenger's seat and they both walked towards the staircase. G H

[17] While going up the staircase, PW3 asked the appellant to hold the plastic bag for a while as he wanted to make a telephone call. The appellant held the plastic bag but did not open it. While looking around the shopping complex, PW3 told the appellant that his friend was waiting for them in the hotel's lobby which was 2 to 3 minutes from where they were standing. The appellant stated that he then proceeded towards the hotel's lobby while still holding the plastic bag. At that time he was walking in front of PW3. I

- A [18] On entering the hotel's lobby he was suddenly accosted by three men from the back who caught hold of him and then pinned him down to the floor. He claimed that he did not have time to run away and that the men who arrested him do so without introducing themselves as police. When the appellant stood up, he saw that PW3 had also been arrested. According to the
- B appellant, when he was arrested, the plastic bag in his hand had fallen to the ground. One of the police officer who had earlier arrested him then took the box out of the plastic bag and opened it. That police officer did not open the newspaper packages inside it but merely told the appellant that they were drugs.
- C [19] The appellant then testified that he and PW3 were brought to the car park and PW3's car was searched by the police officers. In the car, the appellant saw they found a handphone pouch which contained four small plastic packets which each contained crystal like substance. The appellant
- D denied that these items were his. After that both the appellant and PW3 were brought to the appellant's house but the police officers did not find anything incriminating there. From there they were taken to the Damansara police station.
- E [20] The appellant's version of events was that he only knew the contents in the plastic bag held earlier after the police opened and showed it to him in the Damansara police station.
- F [21] At the conclusion of the case for the prosecution, the learned trial judge held that the prosecution had made up a *prima facie* case of actual possession against the appellant. The evidence of the prosecution's three main witnesses PW5, PW6 and PW3 clearly established that the plastic bag which contained the Panasonic box and the five plastic packets of heroin was carried
- G by the appellant in his right hand and hence the accused had physical custody and control of the incriminating drugs.
- [22] With regard to the knowledge, the learned trial judge ruled that:
- H As regards the plastic bag, P7A and the Panasonic box, P9 held by the accused at the time of his arrest it was an open one and did not require much effort to uncover the five plastic packets of heroin, P15A – P15E, which contained heroin. Hence it would not be farfetched for this court to infer that the accused had all the time to see and ascertain the contents of P15A – P15E in the box, P9 and consequently had knowledge of the heroin therein. To my mind the conduct of the accused in
- I carrying P7A in his right hand and he attempting to escape and engaged in a struggle with SP5 and the police party and the condition of the plastic bag, P7A and the Panasonic box, P9 which was not closed and easily opened leads to the irresistible inference of knowledge and hence to my mind the prosecution has established a *prima facie* case of actual possession.

[23] In view of the fact that the weight of the heroin found in the possession of the appellant was 155g, which was well in excess of 15g, the learned trial judge invoked the statutory presumption of trafficking as provided in s 37(da)(i) of the Act.

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[24] It is clear from the learned trial judge's judgment that he had undertaken a maximum evaluation of the evidence adduced by the prosecution, at the close of the prosecution case and held that a prima facie has been made out against the appellant. On the evidence available we agreed with the learned trial judge's decision that a prima facie case had been made out by the prosecution against the appellant at the close of the case for the prosecution.

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[25] With regard to the defence case the learned trial judge held that the defence had failed to create any reasonable doubt nor rebut the presumption of trafficking under s 37(da) of the Act. His reasons can be found at p 186 of the appeal record, which are as follows:

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The accused in his defence on oath from the witness box testified that the plastic bag, P7A which contained the incriminating heroin belonged to SP3 who requested the accused to hold on to the plastic bag as they were walking to the hotel lobby as SP3 wanted to make a phone call, which the accused agreed to.

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The aspect of the accused's testimony that SP3 requested him to carry P7A momentarily as SP3 wanted to make a telephone call is to my mind an afterthought as the accused did not relate this aspect to the investigation officer SP7.

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To my mind the whole scheme of the defence is one of bare denial and afterthought and hence I cannot accept the submission by the accused's counsel that it was an explanation as to how the accused came to be holding the plastic bag at the time of his arrest and that the plastic bag belonged to SP3. He denies the evidence as presented by the prosecution's witness notably that of SP3, SP4 and SP5. I have carefully evaluated the evidence of SP3, SP4 and SP5 and I find that SP3 is a credible witness whose evidence is not only consistent with the evidence of SP5 who are entrusted to ensure the security of the country.

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There is no reason for the police personnel SP4 and SP5 to fix up the accused on so serious a charge, more so when they do not at any time prior to the incident know the accused.

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The existence of drugs in SP3's car does not to my mind affect the credibility of SP3. This is because the nature of the drugs is methamphetamine which is different from the drugs for which the accused is being charged. The difference is further accentuated by the manner of its packaging in small quantities and plastic packets. Again the submission that the factual matrix herein that SP3 was arrested and remanded for 14 days together with the accused does not negate this element of possession by the accused.

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- A [26] Learned counsel for the appellant submitted that the defence had succeeded in casting a reasonable doubt on the prosecution's case that the appellant had knowledge of the contents in the white plastic bag. It was further submitted that the appellant was only an innocent and momentary carrier of the white plastic bag. PW3 was the real trafficker. In support of his arguments learned counsel for the appellant cited, inter alia, the following cases:
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- (a) *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393;
(b) *Ganapathy a/l Rengasamy v Public Prosecutor* [1998] 2 MLJ 577; and
C (c) *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1.

- [27] Learned counsel also submitted that PW3 was not a credible and reliable witness and as such the court should not place any weight on his evidence. PW3 was together with the appellant in the lobby of the hotel and he attempted to run upon seeing the appellant being apprehended by the police. Drugs were found in PW3's car shortly after the appellant and PW3 were arrested. PW3 was remanded with the appellant for 14 days in relation to the drugs found in the plastic bag.
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- E [28] The learned deputy public prosecutor, in response, submitted that the learned trial judge was correct in holding that the prosecution had called PW3 to rebut the defence case that the appellant was an innocent and momentary carrier and there was no evidence that Ah Ma handed over the drugs and the cash to PW3 on the day of the incident to impute PW3 with liability as the real trafficker. It was further submitted that the failure of the appellant to immediately inform PW5 that the drugs belonged to PW3 denotes late disclosure. In support of that, the learned deputy public prosecutor cited the cases of *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46; [2009] 3 CLJ 733 and *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585.
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- [29] Section 182A(1) of the Criminal Procedure Code provides that at the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
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- [30] To earn an acquittal what the appellant had to do was to cast a reasonable doubt in the prosecution case. In *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 Mohamed Azmi SCJ said at p 171:
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To earn an acquittal, the court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused will suffice. It is not, however, wrong for the court to be convinced that the defence version is

true, in which case the court must order an acquittal. In appropriate cases it is also not wrong for the court to conclude that the defence story is false or not convincing, but in that instance, the court must not convict until it asks a further question, that even if the court does not accept or believe the defence explanation, does it nevertheless raise a reasonable doubt as to his guilt? It is for this reason that in dealing with the defence story or explanation, the majority of judges rightly prefer to adopt straightaway the legally established 'reasonable doubt' test, rather than to delve in the 'believable and convincing' test before applying the 'reasonable doubt' test.

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[31] In *Mat v Public Prosecutor* [1963] MLJ 263 Suffian J (as he then was) explained at pp 263 and 264:

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The correct law for magistrates to apply is as follows. If you accept the explanation given by or on behalf of the accused, you must of course acquit. But this does not entitle you to convict, if you do not believe that explanation, for he is still entitled to an acquittal if it raised in your mind a reasonable doubt as to his guilt, as the onus of proving his guilt lies throughout on the prosecution. If upon the whole evidence you are left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon it.

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[32] In *Ganapathy a/l Rengasamy v Public Prosecutor* [1998] 2 MLJ 577, the appellant was convicted by the High Court for an offence of trafficking under s 39B of the Act, and was sentenced to death. He appealed. The Federal Court, by a majority decision, allowed the appeal, quashed the conviction and set aside the sentence of death. Shaik Daud JCA, in allowing the appellant's appeal observed that:

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We find there are many material questions left unanswered by the prosecution in this case and coupled with the learned judge's failure to address material aspects of the defence's case, there has, in our view, been a serious misdirection by way of non-direction. It is our considered finding that on the totality of the case, the appellant has rebutted the presumption under s 37(d) of the Act, on a balance of probabilities. The appellant has established that even though he had custody and perhaps control of the bag and thereby had possession of it, at the time of his arrest, he had no knowledge whatsoever of its contents. The learned judge failed to give consideration to this aspect of the defence. We therefore allowed the appeal, quashed the conviction and set aside the sentence. We ordered the appellant to be acquitted and discharged.

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[33] We have set out the appellant's defence above and he testified that the plastic bag (exh P7A) which contained the incriminating heroin belonged to PW3 who requested the appellant to hold on to the plastic bag as they were walking to the hotel's lobby as PW3 wanted to make a phone call, which the

A appellant agreed to. The learned trial judge was of the view that the appellant's defence was an afterthought as the appellant did not relate that to the investigating officer.

B [34] In our view the defence of the appellant was not an afterthought or a bare denial but an explanation as to how he came to be holding the plastic bag at the time of his arrest. This version by the appellant was not improbable given that the police personnel did not see what happened from the time the appellant and PW3 alighted PW3's car to the time they entered the lobby of the hotel. Furthermore the prosecution evidence revealed that PW3 himself was not an angel. No doubt the appellant did not relate that to the investigating officer but his explanation had to be considered by the court as failure by the appellant to relate to the investigating officer, could never, by itself, relieve the prosecution of its duty of establishing the charge against the appellant beyond reasonable doubt (see *Alcontara all Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209).

E [35] The same issue was considered by this court in *Mohd Hazrin bin Md Sari v Public Prosecutor* [2008] 3 MLJ 798; [2008] 5 CLJ 361 and *Mardani bin Hussin v Pendakwa Raya* [2009] MLJU 537; [2009] 6 CLJ 301 where it was held that the trial judge's criticism of the appellant for not disclosing his defence to the police at the time of his arrest amounted to serious misdirection in law. Similarly, in the instant case, we were of the view that the learned trial judge had gravely erred when he held that the defence's version was an afterthought as the appellant did not inform the police that the plastic bag belonged to PW3 when he was arrested. This serious misdirection by the trial judge had gravely prejudiced the appellant and had occasioned a substantial miscarriage of justice warranting appellate interference.

G [36] It must be remembered that there was no evidence whatsoever by an independent prosecution witness to support PW3's testimony that the appellant was carrying the plastic bag from the time he alighted PW3's car. PW5 and PW6 only saw the appellant and PW3 when they walked into the lobby of the hotel. As such the prosecution had to rely on the evidence of H PW3 alone to show that the bag belonged to the appellant.

I [37] According to PW5 when he and his men arrived at the hotel at about 6pm, he divided his men into three groups. He led the first group and they waited at the lobby of the hotel. The second group was asked to wait at the front of the hotel and the third group was asked to wait at the rear main entrance. According to PW5, the appellant and PW3 entered the lobby from the rear main entrance. Strangely there was no evidence from the officers in the third group who were waiting there at that time to say whether they saw or not PW3 and the appellant walking towards the rear entrance.

[38] The prosecution had adduced evidence that the appellant attempted to run prior to being apprehended by the police. However in PW5's police report (exh P17), PW5 said that both the appellant and PW3 attempted to run on being apprehended. The question to ask then is why did PW3 try to run away if he had nothing to do with the plastic bag. This aspect of the evidence was never considered by the learned trial judge in his judgment.

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[39] It was the defence's case that PW3 was the trafficker and the plastic bag belonged to PW3 and support for this argument can be found in the fact that PW3 had RM2,000 when he was arrested despite not working for two years. PW3 had known Ah Ma for about two to three years and it was the defence's case that PW3 was asked by Ah Ma to transport the drugs to the hotel and was paid RM2,000. Shortly after both the appellant and PW3 were arrested, the police recovered four packets of syabu in PW3's car and PW3 was charged in the magistrates court for the offence. PW5 also seized RM2,000 from PW3. The police did not find any drug in the appellant's house. PW3 was also arrested and remanded for 14 days together with the appellant.

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[40] PW3 testified that he received a telephone call from Ah Ma to drive the appellant to the hotel. At that time PW3 was in Sri Petaling. Under cross-examination he also said he went to Kepong because Ah Ma asked him to go there as Ah Ma had something to discuss with him. The appellant's version was that Ah Ma told him Ah Ma's friend would send him home as Ah Ma was busy and could not send the appellant home. Ah Ma's friend was PW3. When he was inside PW3's car, PW3 told him that PW3 wanted to go to IKEA at One Utama first. When they arrived at the hotel, PW3 asked the appellant to follow him to the lobby of the hotel.

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[41] Whilst PW3's explanation as to how he went to see Ah Ma may be credible, we cannot but say that it was rather strange for Ah Ma to ask PW3 to come all the way from Sri Petaling just for the purpose of sending the appellant to the hotel as PW3 did not know the appellant. Furthermore, from PW3's own evidence it was clear that PW3 did not know Ah Ma well as he did not know Ah Ma's full name and Ah Ma's house. We were of the view that there was something more to it when PW3 went to meet Ah Ma in Kepong rather than just to send the appellant to the hotel. The appellant could have just taken a taxi from Kepong to go to the hotel. The learned trial judge did not find this odd; in fact, he made no comment on this.

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[42] The learned trial judge gave his reasons for his finding that PW3 was a credible witness and the defence was one of bare denial and afterthought. With respect, we were of the view that the learned trial judge adopted an oversimplistic approach to the case for the prosecution and the defence, in

- A that he failed to take into account or to give proper weight to or draw proper inferences from every fact which told in favour of the appellant, and thus, failed to review the evidence from all angles, with the result that a miscarriage of justice had occurred (see *Arulpragasam all Sandaraju v Public Prosecutor* [1997] 1 MLJ 1 at p 65). The learned trial judge, in our view, ought to have
- B held that the explanation of the appellant was sufficient to have created a reasonable doubt on his guilt. Had he followed the advice of Suffian J in *Mat v Public Prosecutor* he would not have convicted the appellant on the offence charged.
- C [43] We were mindful of the law that we should be slow to interfere with the finding of facts by the trial court as we did not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility (see *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 38). However an
- D appellate interference would take place where there had been no judicial appreciation of evidence or insufficient judicial appreciation of evidence (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1). In *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 Edgar Joseph Jr SCJ said at p 142:
- E Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non-direction amounts to a misdirection, for in the words of
- F Pickford J in *R v Bundy*¹: ‘... the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence.’
- We must treat the failure of a trial judge sitting alone, to direct himself correctly in the same way as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.
- G [44] Due to the failure of the learned trial judge to view the whole evidence objectively and from all angles and the serious misdirection made by the learned trial judge, a miscarriage of justice had occurred. We were therefore satisfied that the conviction of the appellant was unsafe and should be set aside. We accordingly allowed the appeal, quashed the conviction and set
- H aside the sentence.

Appeal allowed.